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424951—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 697

LEON CHARLES WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the Circuit Court of Appeals (R. 1231–1236) is reported in 120 F. (2d) 472; the opinion on petition for rehearing (R. 1242–1270) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 9, 1941 (R. 1237), and a petition for rehearing (R. 1238–1241) was denied September 11, 1941 (R. 1270). The petition for a writ of certiorari was filed October 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment, charging a single general scheme to defraud, was rendered duplicitous because it alleged separate transactions as means of executing the general scheme.

2. Whether evidence of petitioner's participation in other frauds on the State of Louisiana and its instrumentalities was properly admitted to prove his intent to commit the fraud charged in the indictment.

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C., Sec. 338) provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the Post Office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in nine counts was returned against petitioner and Monte E. Hart on November 14, 1939 (R. 2–34). They were charged in the first eight counts (R. 2–30) [1] with using the United States mails in the execution of a scheme to defraud the State Department of Education of Louisiana, the State Board of Education, Louisiana Polytechnic Institute, and the State of Louisiana, its taxpayers and citizens, of approximately $56,914.42.[2] This scheme was alleged to have been accomplished in the following manner:

Petitioner was the senior member of a firm of architects employed to draw the plans, supervise the letting of the contract, and superintend the construction of an administration and classroom building at Louisiana Polytechnic Institute (R. 3–4). A low bid of $264,482.13 was submitted by the firm of Caldwell Brothers and Hart (R. 4). As part of the scheme, however, petitioner drafted the contract so as to provide for the payment of $291,482.13 to Caldwell Brothers and Hart, or $27,000 more than the bid price (R. 4–5, 6–7). This fictitious and fraudulent increase in the contract price was concealed from the president of the State Board of Education and petitioner and Hart induced him to sign the contract by falsely representing to him that the price fixed therein was in accordance with the bid submitted by Caldwell Brothers and Hart (R. 5, 6–7). As a further part of the scheme to defraud, petitioner prepared a false final architect's certificate under

[1] The ninth count (R. 30–34) alleged that the defendants conspired to commit the offenses alleged in the substantive counts.

[2] This figure does not correspond exactly with the sum of the alleged $27,000 upward revision of the construction contract and the $29,056.04 overpayment for "extras." This, of course, is an immaterial variance and petitioner makes no point of it.

which Caldwell Brothers and Hart were paid $29,056.04 for fictitious "extras" (R. 5–6, 7–8).[3]

Hart having committed suicide before trial (R. 104–105, 1247), petitioner was tried alone. He was found guilty on counts 1, 2 and 3 (R. 1223), and sentenced to five years' imprisonment on the first count (R. 1225). Imposition of sentence on the second and third counts was suspended and petitioner was placed on probation (*ibid*). The Circuit Court of Appeals, with one judge dissenting, affirmed the conviction (R. 1231–1237), and on petition for rehearing reaffirmed its prior decision (R. 1242–1270).[4]

ARGUMENT

I

Although the theory upon which petitioner bases his contention that the indictment was duplicitous is somewhat obscure, the argument appears to be that the various counts, particularly count 1, upon which he was sentenced, charged two "separable" frauds, and that, in consequence, there is no assurance that the jurors unanimously concurred in deciding that petitioner was guilty of either fraud (Pet. 8, 13, 14, 17). The contention merits no further review by this Court.

As the court below pointed out (R. 1235, 1243–1247), the indictment charged but one scheme to defraud, namely, a scheme to defraud the State of Louisiana, its educational institutions, and its taxpayers of $56,914.42 by fraudulently increasing the cost of a State building. Petitioner's contention is based upon the averments particularly describing the *manner and means* by which this scheme was carried out, that is, by increasing

[3] The indictment also alleged that part of the scheme was to withhold and conceal copies of the construction contract from the associate architectural firm and from the State and its agents and agencies and to conceal the so-called extras covered by petitioner's final architect's certificate (R. 6).

[4] Since petitioner does not claim that the evidence was insufficient to support the verdict, it is unnecessary to delineate the proof adduced at the trial.

the contract price of the building and by adding a fictitious claim for "extras". It is settled, however, that allegations of separate transactions as means of accomplishing a single integrated scheme to defraud do not render such an indictment duplicitous. *Leche* v. *United States*, 118 F. (2d) 246, 247 (C. C. A. 5), certiorari denied, October 13, 1941 (No. 169, October Term, 1941); *Morris* v. *United States*, 112 F. (2d) 522, 526 (C. C. A. 5), certiorari denied, 311 U. S. 653; *Belt et al*, v. *United States*, 73 F. (2d) 888, 889 (C. C. A. 5), certiorari denied, 294 U. S. 713; *Sconyers* v. *United States*, 54 F. (2d) 68, 69 (C. C. A. 5), certiorari denied, 285 U. S. 554; *Sunderland* v. *United States*, 19 F. (2d) 202, 207 (C. C. A. 8), certiorari denied, *sub. nom. Thomas H. Matters* v. *United States*, 255 U. S. 575; *Silkworth* v. *United States*, 10 F. (2d) 711, 714 (C. C. A. 2), certiorari denied, 271 U. S. 664.[5]

Since the indictment charges a single scheme to defraud, it is immaterial that the means by which that scheme was executed may present, as petitioner contends, "two separate and dissimilar factual situations" (Pet. 21). Obviously, a single scheme to defraud may encompass dissimilar means of execution. Furthermore, the two transactions by which the single scheme here was alleged to have been carried out are related in character. Both transactions involved excess payments to

[5] For the same reasons petitioner's complaint (Pet. 10, 13–14, 22) against the trial court's charge to the jury is not well taken. The court properly instructed the jury that the indictment charged a scheme to defraud by increasing the price of the building and that the scheme was alleged to have been consummated by making an addition to the contract price and by charging for fictitious "extras" (R. 1158). The court further instructed the jury (R. 1167): "* * * I tell you that in this case the intention to defraud and the scheme to defraud must have been conceived before any of these letters or documents were mailed—in other words, it could only be a crime to make such mailings when such a scheme existed, and but for the mailing, no matter how great the scheme or how fraudulent the scheme, if nothing was ever mailed there would be no Federal jurisdiction. * * *" It must be assumed, therefore, that the jury found that the scheme to defraud existed prior to the mailings alleged in counts 1, 2 and 3, the only counts upon which petitioner was convicted.

the same contractor for work done or to be done on the same construction job.

There is no conflict between the decision below and that of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Buckner*, 108 F. (2d) 921, certiorari denied, 309 U. S. 669. The portion of the *Buckner* decision cited by petitioner (Pet. 31–34) was grounded upon the insufficiency of the evidence to show the formulation of a scheme to defraud prior to the mailings alleged in two of the counts of the indictment.[6] We do not understand that petitioner makes any such contention here.

II

By his plea of not guilty petitioner placed in issue the question of his fraudulent intent in the transactions alleged in the indictment. It was the gist of petitioner's defense that, however fraudulent may have been the conduct of Hart in connection with the construction of the building for the Louisiana Polytechnic Institute, petitioner was no more than Hart's dupe and did not enter into any scheme with Hart to defraud.

As part of its proof of petitioner's fraudulent intent, the Government was permitted to introduce evidence of other fraudulent transactions and schemes, in most of which petitioner and Hart participated and which were accomplished in a substantially similar manner (R. 640, 641). These involved construction projects at Louisiana State Normal College, Louisiana State University, and Charity Hospital at New Orleans, which is associated with Louisiana State University (R. 133, 645, 663–664, 666, 686, 727, 738–748, 748–750, 759–760, 761–762, 788–797, 816–821, 828, 831, 1079, 1081, 1096–1097, 1100–1104, 1105–1107). Another had to do with the endorsement by petitioner of a $75,000 cashier's

[6] *Hass* v. *United States*, 93 F. (2d) 427 (C. C. A. 8), also cited by petitioner (Pet. 29–31), was decided upon the same ground.

check payable to petitioner's order, which petitioner then returned to Dr. James Monroe Smith, president of Louisiana State University, thus enabling Smith to negotiate the check and thereby convert university funds (R. 1069–1075). Petitioner complains (Pet. 34–53) that this evidence of "collateral" matters was irrelevant and prejudicial. But the evidence was adduced by the Government to show that petitioner did intend to enter into a scheme with Hart to accomplish the fraud charged. Manifestly, the existence of these other frauds, in most of which Hart participated, was relevant in determining the credibility of petitioner's defense that he was simply Hart's dupe.

Such evidence of offenses similar to the offense charged is always admissible to prove intent. 2 *Wigmore,* Evidence (3rd ed., 1940), secs. 304–305; 1 *Wharton,* Criminal Evidence (11th ed., 1935), sec. 345; *Morris* v. *United States,* 112 F. (2d) 522 (C. C. A. 5), certiorari denied, 311 U. S. 653. And it is not made inadmissible because it may indicate the commission of other crimes. *Suhay* v. *United States,* 95 F. (2d) 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580; *Moore* v. *United States,* 150 U. S. 57; *Devoe* v. *United States,* 103 F. (2d) 584 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Dysart* v. *United States,* 270 Fed. 77 (C. C. A. 5), certiorari denied, 256 U. S. 694. The theory underlying the admissibility of this type of evidence is that numerous acts of a similar character, particularly when committed over a period of time, are strongly indicative of criminal intent, which can only be proved indirectly in any case. See *Samuels* v. *United States,* 232 Fed. 536 (C. C. A. 8); Coleridge, C. J., in *Regina* v. *Francis* [1874], 2 Crown Cas. 128. The testimony with respect to the $75,000 Smith check was clearly admissible for the same reason, the only explanation offered by petitioner being another claim that he had been duped by Smith as he claimed

to have been duped by Hart in the transactions charged in the indictment.[7]

That this was the rationale upon which the trial court proceeded is made clear by the judge's remarks when he permitted the evidence to be received (R. 640, 641):

> I am going to permit the Government to prove any transactions in which Mr. Weiss in connection with Mr. Monte Hart or this firm approved payments to be made to them, or fees that were paid to himself in connection with these matters, *to illustrate his intentions.*
>
> * * * * *
>
> As indicated in previous rulings in matters of this kind the Government will be allowed to prove such transactions as happened in the dealings in which Caldwell Brothers and Hart were the contractors and this defendant or his firm of architects which are of a similar

[7] The evidence with respect to this check was elicited from petitioner on cross-examination and was admitted by the trial court for its bearing upon the transactions between petitioner and Caldwell Brothers and Hart concerning the Southern Dairy Products Company (R. 1069–1070). It had previously been shown that Caldwell Brothers and Hart had given petitioner numerous checks totalling approximately $75,000, purportedly in payment for stock in the dairy company (R. 1048–1051), which was sponsored by petitioner (R. 1032, 1043–1046). The evidence indicated that this company was insolvent at the time (R. 1053–1054) and, also, that the stock certificates were not delivered to Caldwell Brothers and Hart, but were retained by petitioner (R. 1042–1043). In overruling the motion for a new trial the trial judge stated that the jury might have inferred from this evidence that the dairy company "was a mere front or sham for the purpose of covering up the receipt of these sums of money out of the sums that had been realized from this transaction. The testimony showed some of these checks, at least, passed into his [petitioner's] private bank account" (R. 1190–1191; see also R. 1066). Petitioner admitted that the first told a federal investigator that the $75,000 check was tendered to him by Smith to finance the construction of a modern plant by the dairy company (R. 1071–1072), and that he later changed his story and told the investigator that Smith tendered him the check in payment for architectural services (R. 1073–1075). In the circumstances the court below correctly held that "this so-called extraneous fraud was admissible to prove contradictory statements by Weiss himself" (R. 1261), as well as to show that Weiss was associated with Smith in perpetrating a fraud upon Louisiana State University (R. 1263).

> nature and transpired along about the same time as this transaction *as throwing light on the question of intent on the part of the defendant in his conduct in connection with the case on trial and the matters arising in the case on trial.* * * * [Italics supplied.]

Petitioner further urges that a new trial should have been granted him because he was surprised by the introduction of the $75,000 Smith check and was unable to present an adequate explanation therefor, which, he says, would have shown that the transaction was entirely innocuous (Pet. 51–53). Such a claim of unfair surprise seems particularly inappropriate since petitioner, by his plea of not guilty and his testimony in chief, had put the question of his criminal intent directly in issue and the evidence claimed to have surprised the defense was elicited from petitioner himself. The legal objection of unfair surprise is not available just because the other side does not anticipate specific evidence; the purpose of the objection is to prevent the introduction of evidence which may have been so skillfully fabricated that its spurious character cannot be detected at once. Evidence tending to show a defendant's specific intent and concerning matters leading up to and succeeding the offense charged, which is always to be anticipated, stands on a very different footing. 2 *Wigmore,* Evidence (3rd ed., 1940), sec. 305.

In any event, the remedy for unfair surprise is by motion for a new trial addressed to the discretion of the trial court. Such a motion was made in this case, but the trial court overruled it, stating (R. 1191–1192):

> Then in addition to that I do not think the point made by Mr. Wilkinson at the present time with regard to this seventy-five thousand dollar check justifies me in allowing a new trial in this case. Mr. Weiss took the stand and told his story, not only with regard to that, but with regard to every transaction mentioned in this case, how it happened, and the jury heard that

> and had the benefit of his entire explanation of it, and how it all came about. To say that the jury used that one incident in order to find the defendant guilty in this case I do not think would be true. I think it is a collateral matter that is not of such importance to this case as to justify the Court in setting aside the verdict and granting a new trial. To say that it disclosed a fraud upon which the jury acted, or disclosed a fraud sufficiently impressive to have caused the jury to find the verdict it did in this case, I do not think is true, and the motion for a new trial will be overruled.

Plainly, this conclusion reached by the trial court, in the exercise of its discretion, does not call for review by this Court.

CONCLUSION

The case was correctly decided below, there is no conflict of decisions, and no important question of law is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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